JD(SF)–41–04
Salinas, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 817, AFL-CIO

and Cases 32-CB-5713-1

CHILDREN'S SERVICES INTERNATIONAL, INC.

Thomas Bell, Esq., Oakland, California,
for the General Counsel.

Antonio Ruiz, Esq.,
(Weinberg, Roger & Rosenfeld),
Oakland, California, for the Respondent.

DECISION

Statement of the Case

JAY R. POLLACK, Administrative Law Judge: I heard this case in trial at Oakland, California, on April 27, 2004. On December 9, 2003, Children's Services International, Inc. (the Employer) filed the original charge alleging that Service Employees International Union, Local 817, AFL-CIO, (Respondent or the Union) committed certain violations of Section 8(b)(1)(A) of the National Labor Relations Act, as amended (29 U.S.C. Section 151 et seq., herein called the Act). The Employer filed the amended charge on February 12, 2004. On February 26, 2004, the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that the Union violated Section 8(b)(1)(A) of the Act by providing employees of the Employer a dues rebate in order to influence the election in Case 32-UD-207. Thereafter on April 7, 2004, the Regional Director issued an amended complaint against Respondent adding the allegation that the dues rebate was in excess of the dues required under the union-security clauses at issue in Case 32-UD-207. Respondent filed timely answers to the complaints, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs of the parties, I make the following:

Findings of Fact and Conclusions

I. Jurisdiction

The Employer is a California non-profit corporation with facilities in Gonzalez, Greenfield, Marina, Salinas and Pajaro, California engaged in providing childcare and educational services. During the 12 months prior to issuance of the complaint, the Employer, in

the course and conduct of its business, received gross revenues in excess of $250,000 and directly received revenues in excess of $100,000 from outside the State of California. Accordingly, Respondent admits and I find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent admits and I find that at all times material herein Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. The Facts

Respondent and the Employer are parties to a collective-bargaining agreement, effective by its terms from October 1, 2002 to September 30, 2004. The agreement covers two units of the Employer's employees; the Center Base Unit and the Administrative Unit. The agreement includes a union-security clause requiring unit employees, after a lawful grace period, to become and remain members of the Union.

On November 14, 2003, Maria de Jesus Luquin, filed the petition in Case 32-UD-207 seeking to withdraw the authority of the Employer and the Union to enforce the union-security clause. On April 1, 2004, an election was held under the supervision of the Regional Director of Region 32. On April 12, 2004, the Regional Director issued a certification of results of election certifying that a majority of the eligible employees did not vote to withdraw the authority of the Union and Employer to enforce the lawful union-security clause. The gravamen of the amended complaint is that on November 26, 2003, after the filing of the petition, Respondent authorized a "dues rebate" to employees of $30.00 per month. At the time the deauthorization petition was filed, the unit employees were paying approximately $24 per month in union dues.

A portion of the monthly dues paid by the approximately 6,500 members of the Union is earmarked for a " strike defense fund." The strike defense, generally, is used for financial aid to employee-members of the Union who are out of work due to a work stoppage. However, on occasion monies from this defense fund have been used to aid employee-members in non-strike situations. In these non-strike situations the Union has labeled the monetary relief given to employee-members as a "dues rebate."

In the instant case, prior to the filing of the deauthorization petition, the Union was attempting to obtain a cost of living adjustment for the Employer's employees pursuant to the collective-bargaining agreement. Beginning in July 2003, the Employer took the position that under the collective-bargaining agreement it was not required to make such an adjustment due to economic conditions. The Union sought factual data, pursuant to the collective-bargaining agreement to substantiate the Employer's funding level.

Four days after the petition was filed in Case 32-UD-207, John Vellardita, Respondent's executive director, wrote the Employer stating, inter alia:

> Rather than comply with provisions of the Labor Agreement and applicable provisions of Federal labor law, CSI has embarked on an illegal campaign to decertify SEIU as the legal bargaining representative of CSI employees. We will take any and all appropriate actions to defend our interests.

Vellardita testified that he was referring to efforts by the Employer to decertify the Union. Vellardita testified that he understood that the UD petition was not a decertification petition.

Approximately one week later, the Union's executive board authorized a "dues rebate " for the Employer's employees in the amount of $30 per month. This amount was in excess of the dues paid by the bargaining unit employees. Vellardita testified that the amount was based on what the employees would have received had the Employer paid the cost of living adjustment. He stated that many of the employees were receiving a poverty wage and needed some relief until the Union could resolve its dispute with the Employer. In announcing the rebate program to the employees, Vellardita stated that the Union could discontinue the program at its discretion at any time.

On December 3, 2003, the Union issued the following application for a "defense fund rebate", in English and Spanish:

> The Board of Directors of SEIU Local 817 has authorized CSI workers to receive a $30 a month defense fund rebate because SEIU Local 817 has assessed that CSI future operations are at risk as long as the current management is in control of the agency.
>
> SEIU Local 817 has determined that CSI operations needs to have new management to ensure that the CSI remains open, that CSI funds are spent as they are intended to—serving children, and so that our members can keep their jobs. To this end, SEIU is taking measures to defend and protect our members interests.
>
> As a member of SEIU Local 817 and the bargaining unit of CSI I can apply for this benefit. By applying for this monthly defense fund rebate I understand the following:
>
> > That SEIU Local 817 Board of Directors has issued this monthly defense fund to aid and assist members because CSI management has failed to deliver on agreed upon economic benefits of the contract as outlined in . . . .
> > That SEIU Local 817 Board of Directors can change, modify, or terminate this monthly defense fund benefit at any time.
>
> I will receive the $30 defense fund rebate each month until I elect not to receive the benefit or when the Board of Directors takes action to terminate the benefit.

The 102 employees covered by the Union's collective-bargaining agreement with the Employer applied for, and received, the $30 per month dues rebate. As stated earlier an election was held on April 1, 2004, pursuant to the UD petition. No objections to the conduct of the election were filed and on April 12, 2004, the results of the election were certified. The Union retained the right to maintain its lawful union-security clause.

B. Analysis and Conclusions

Section 8(b)(1)(A) of the Act provides that it shall be an unfair labor practice for a labor organization "to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7 of the Act." The proviso to Section 8(b)(1)(A) states that the Section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

Section 8(b)(2) makes it an unfair labor practice for a union:

> To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on

> some ground other than failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

The proviso to Section 8(a)(3) of the Act permits an employer to make an agreement with a labor organization "to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later. . . ."

Section 9(e)(1) of the Act reads:

> Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

Reading these Sections of the Act together, it is clear that the congressional purpose of Section 9(e)(1) was to prevent the imposition of a union-security agreement upon an unwilling majority of a bargaining unit.

In *EFCO Corp.,* 185 NLRB 220 (1970) the principal issue presented was whether the granting of a monetary benefit by a union upon the filing of a deauthorization petition improperly restrained and coerced employees in their right to decide whether to continue a union-security clause in their collective-bargaining agreement. The Board held that a union's announcement of a reduction in dues on the eve of a deauthorization election did not improperly influence the outcome of the election so as to require that the results be set aside. The Board, applying the then existing representational case law, further held a union's waiver of initiation fees, whether or not conditioned on the outcome of the election, did not constitute a ground for setting aside a representation election. However, in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973), the United States Supreme Court found that the union interfered with a fair and free election by limiting its offer of a waiver of dues to those employees who demonstrated support for the union before the election. The Court found the offer objectionable because it "paint[ed] a false portrait of employee support" and could have provoked a false sense of moral obligation to vote for the union in the election. 414 U.S. 277-278. Thus, *EFCO* was overruled to the extent that it permitted a union to condition a waiver of fees or dues on the results of an election.

In *Flatbush Manor Care Center,* 287 NLRB 457 (1987) the Board found that the respondent-union violated Section 8(b)(1)(A) by making payments of money to employees in the bargaining unit prior to a Board-conducted representation election. During the critical period after the filing of the representation petition, the union made payments ranging from $4.80 to $114 to 48 of the 64 unit employees.[1] The payments were not conditioned on support of the union. Nonetheless, the Board concluded that the mere fact that the employees were given the payments during the pendency of the petition gave employees the impression that the payments would continue if the union was selected as their bargaining representative. Therefore, the Board held that the payments restrained and coerced employees in violation of Section 8(b)(1)(A) of the Act. The Board rejected the union's defense that the payments were justified to supplement employees' wages.

[1] In the instant case, employees received $150 during the period between the filing of the petition and the election.

In *Teamsters Local 776 (Pepsi Cola),* 305 NLRB 832 (1991) the Board adopted the administrative law judge's decision which found that the respondent-union violated Section 8(b)(1)(A) of the Act by refunding initiation fees to certain bargaining unit members shortly before the decertification election. In that case, the refunds were all received a few days before the election. The judge, citing *Flatbush Manor Care Center*, 287 NLRB 457 (1987) and relying heavily on the timing factor, concluded that the refunds were calculated to restrain and coerce the employees in the course of considering how to vote in the election.

Respondent argues that *Flatbush Manor* and *Teamsters Local 776 (Pepsi Cola),* are distinguishable because those cases involved a question concerning representation. In this case involving a deauthorization petition, the Union would be the exclusive collective-bargaining representative of the employees regardless of the results of the election. Further, the election cannot be set aside because timely objections were not filed. However, as illustrated by the Board's decision in *EFCO, Corp.,* the Board holds that the purpose of Section 9(e)(1) is to prevent the imposition of a union-security agreement upon an unwilling majority of a bargaining unit. Thus, the Board seeks to protect the election process in deauthorization cases just as it does in representation cases and decertification cases. The timing of the payment to bargaining unit employees, shortly after the filing of the petition places the burden on the Union of proving that the "rebate" was for a purpose other than interfering with the deauthoriziation election and creating a moral obligation of voting in favor of the Union's existing union-security clause. Clearly, the timing of these payments to the employees, shortly after the filing of the petition, has the outward appearance of a bribe.

The Union presented no written minutes of its Board of Directors or any other documentary evidence to establish the purpose of the monetary payments. While Vellardite testified that the purpose was to aid employees because they did not receive an expected cost of living adjustment, he did not explain why the payments were not made until after the deauthorization petition was filed. Respondent had known for three or four months that the Employer was claiming an inability to pay the cost of living adjustment.

Based on the size of the monetary benefit (in excess of the amount of Union dues); the fact that all unit employees received the payments; the fact that employees reasonably would view the payment as a reaction to the petition; and the timing of the benefit immediately after the filing of the petition, I find the Union's payments to employees tended to unlawfully influence the outcome of the election.

The announcement of the dues rebate or monetary payment was reasonably calculated to, and did, interfere with the employees in their freedom of choice in accepting or rejecting the union security clause. Thus, I find that the announcement of dues rebate and the granting of monetary payments violated Section 8(b)(1)(A) of the Act.

Conclusions of Law

1. Children's Services International, Inc., is an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

2. Service Employees International Union, Local 817, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(b)(1)(A) of the Act by announcing and making monetary payments to employees in order to restrain and coerce employees during the pendency of a deauthorization petition filed with the Board.

4. Respondent's acts and conduct above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent engaged in unfair labor practices, I recommend that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[2]

ORDER

The Respondent Teamsters Union Local No. 287 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, its officers agents, and representatives, shall:

1. Cease and desist from

(a) Announcing and granting monetary payments or dues rebates, in order to restrain or coerce employees' choice in a NLRB-conducted election.

(b) In any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its hiring hall, meeting rooms, and offices in Salinas, California, copies of the attached notice marked Appendix".[3] Copies of the Notice, on forms provided by the Regional Director for Region 32 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material.

(b) Within 14 days after service by the Region, sign and return to Regional Director for Region 32 sufficient copies of the notice for posting by the Children's Serices International, if willing, at all places where notices to employees are customarily posted. Further, Respondent-Union shall duplicate and mail, at its own expense,

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

a copy of the Notice to Employees and Members, to all former bargaining unit employees employed by the Employer at any time since December 3, 2003, and to all current bargaining unit employees employed at any work site at which the Employer is unable for any reason to post the Notice to Employees and Members.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, San Francisco, California, May 28, 2004.

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Jay R. Pollack
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we have violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join or assist any union
To bargain collectively through representatives of their own choice
To act together for mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT announce or grant monetary payments or dues rebates to influence employee-voters in NLRB-conducted elections.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act.

Service Employees International Union, Local 817, AFL-CIO
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1301 Clay Street, Federal Building, Room 300N, Oakland, CA 94612-5211
(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (510) 637-3270.